

90-1067

Supreme Court, U.S.
FILED

JAN 2 1991

JOSEPH F. SPANIOLO, JR.
CLERK

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ESTATE OF MARTIN J. MALONE

JAMES A. PAVELA,

Petitioner,

vs.

FLORENCE M. MALONE,
INDEPENDENT EXECUTOR OF
THE ESTATE OF MARTIN J. MALONE,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS,
FIRST JUDICIAL DISTRICT**

CHARLES F. MARINO
Counsel of Record

DAVID M. MARINO
39 South LaSalle Street
Suite 1424
Chicago, Illinois 60603
(312) 236-4260

Attorneys for Petitioner



QUESTIONS PRESENTED

The following questions are presented by the Petitioner for Certiorari:

1. Whether due process requires, as a minimum, that the contents of a notice (a) explain what action an interested party might take to protect his rights and (b) indicate the time limit for taking such action?
2. Whether the minimum requirements of due process with respect to the contents of a notice extend to parties represented by counsel?

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, Petitioner, James A. Pavela, states that Creative Office Interiors, Inc is an Illinois corporation. It does not have a parent company or nonwholly owned subsidiary.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
RULE 29.1 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	6
A. THE PARTIES	6
B. THE ACTION BELOW	7
1. Proceedings in the Trial Court	7
2. The Appeal to the Appellate Court of Illinois	7
3. The Decision of the Appellate Court of Illinois	7
4. Petition for Leave to Appeal to the Su- preme Court of Illinois	8
5. Constitutional Issues Presented Below ..	8
C. STATEMENT OF FACTS	8

REASONS FOR GRANTING THIS WRIT	11
1. DUE PROCESS SHOULD REQUIRE, AS A MINIMUM, THAT THE CONTENTS OF A NOTICE (A) EXPLAIN WHAT ACTION AN INTERESTED PARTY MIGHT TAKE TO PROTECT HIS RIGHTS AND (B) INDICATE THE TIME LIMIT FOR TAKING SUCH ACTION	12
2. THE MINIMUM REQUIREMENTS OF DUE PROCESS WITH RESPECT TO THE CONTENTS OF A NOTICE SHOULD EXTEND TO PARTIES WHO ARE REPRESENTED BY COUNSEL	18
CONCLUSION	22
INDEX TO APPENDICES AND APPENDICES	<i>infra</i>

TABLE OF AUTHORITIES

Cases	PAGE
<i>Armstrong v. Armstrong</i> , 130 F.R.D. 449 (D. Colo. 1990)	16, 21
<i>Berke v. First National Bank & Trust Company</i> (1979), 77 Ill.2d 452, 397 N.E.2d 842	13
<i>Chalaby v. Driskell</i> (1964), 237 Or. 245, 390 P.2d 632	15
<i>Gibbs v. Estate of Dolan</i> (1st Dist. 1986), 146 Ill. App.3d 203, 100 Ill.Dec. 61, 496 N.E.2d 1126 ..	15
<i>In re Estate of Garawany</i> (2nd Dist. 1980), 80 Ill. App.3d 401, 35 Ill.Dec. 735, 399 N.E.2d 1024 ..	15
<i>In re Estate of Martin J. Malone, James A. Pavela v. Florence M. Malone, independent executor of the estate of Martin J. Malone</i> (1st Dist. 1990), 198 Ill.App.3d 960, 556 N.E.2d 678 .	
.....	<i>passim</i>
<i>In re Estate of Newcomb</i> (3rd Dist. 1972), 6 Ill. App.3d 1094, 287 N.E.2d 141	15
<i>In re Rogowski</i> , 115 B.R. 409 (Bkrctcy, D. Conn. 1990)	16, 21
<i>In re Estate of Worrell</i> (1982), 92 Ill.2d 412, 442 N.E.2d 211	13, 15
<i>Martin v. Dugger</i> , 686 F. Supp. 1523 (S.D. Fla. 1988)	15, 21
<i>Mennonite Board of Missions v. Adams</i> (1983), 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 ..	
.....	12, 19, 20, 21
<i>Morse v. Pacific Ry. Co.</i> (1901), 191 Ill. 356, 61 N.E. 104	15

<i>Mullane v. Central Hanover Bank & Trust Co.</i> (1950), 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865	12
<i>New York v. New York, N.H. & H.R. Co.</i> (1953), 344 U.S. 293, 73 S.Ct. 299, 97 L.Ed. 333, Mo- tion to modify den. 345 U.S. 901, 73 S.Ct. 639, 97 L.Ed. 1339	12, 17, 18, 20
<i>Reliable Electric Co., Inc. v. Olson Construction</i> <i>Co.</i> , 726 F.2d 620 (10th Cir. 1984)	15, 21
<i>Robinson v. Hanrahan</i> (1972), 409 U.S. 38, 93 S.Ct. 30, 34 L.Ed.2d 47	12
<i>Schroeder v. New York</i> (1962), 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed.2d 255	12, 14
<i>Tulsa Professional Collection Services, Inc. v.</i> <i>Pope, Executor of the Estate of Pope</i> (1988), 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565	4, 10, 12, 14
<i>Walker v. Hutchinson</i> (1956), 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d 178	12

United States Constitution

Section 1 of the Fourteenth Amendment	2
---	---

Statutes

Ill. Rev. Stat., Ch. 110½, Section 18-3 (1975) .	3, 16, 17
Ill. Rev. Stat., Ch. 110½, Section 18-12 (1975) .	3, 4
Ill. Rev. Stat., Ch. 110½, Section 18-3, as amended (1989)	4, 5, 17
Ill. Rev. Stat., Ch. 110½, Section 18-12, as amended (1989)	5, 6

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

ESTATE OF MARTIN J. MALONE

JAMES A. PAVELA,

Petitioner,

VS.

**FLORENCE M. MALONE,
INDEPENDENT EXECUTOR OF
THE ESTATE OF MARTIN J. MALONE,**

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS,
FIRST JUDICIAL DISTRICT**

James A. Pavela respectfully petitions for a writ of certiorari to review the judgment of the Appellate Court of Illinois in this case:

OPINIONS BELOW

The final judgment order of the Probate Division of the Circuit Court of Cook County, Illinois is unreported. (App., *infra*, A 1). The opinion of the Appellate Court of

1

Illinois (App., *infra*, B 1-8) is reported as *In re Estate of Martin J. Malone, James A. Pavela vs. Florence M. Malone, independent executor of the estate of Martin J. Malone* (1st Dist. 1990), 198 Ill.App.3d 960, 556 N.E.2d 678.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

The judgment of the Appellate Court of Illinois was entered on May 14, 1990 (App., *infra*, B 1-8). A timely petition for leave to appeal was denied by the Supreme Court of Illinois on October 3, 1990 (App., *infra*, C 1). An order granting a stay of the mandate was entered by the Supreme Court of Illinois on October 23, 1990 (App., *infra*, D 1-2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment, Section 1 of the United States Constitution provides, in relevant part:

“... no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

2. During the time period applicable to this case, the Illinois Probate Act provided only for notice of the claim date by publication.

(a) Section 18-3 of the Illinois Probate Act, *Ill. Rev. Stat.*, Ch. 110½, Section 18-3 (1975) provided as follows:

Section. 18-3. Publication. (a) It is the duty of the representative to publish once each week for 3 successive weeks, commencing within 14 days after the issuance of letters of office, a notice informing all persons of the death of the decedent, the date of issuance of the letters, the name and address of the representative and of his attorney of record and that claims may be filed within 6 months from the date of issuance of the letters and that any claim not filed within that period is barred.

(b) If notice is not published as provided in subsection (a) of this Section, it is the duty of the representative to publish once each week for 3 successive weeks a notice informing all persons of the death of the decedent, the date of issuance of the letters, the name and address of the representative and of his attorney of record and that claims may be filed within 6 months from the first publication date and that any claim not filed within that period is barred.

(c) The notice under subsection (a) or (b) of this Section must be published in a newspaper published in the county where the estate is being administered and may be combined with any notice under Section 6-10 or subsection 28-2(c). The representative must file proof of publication with the clerk of the court.

(b) Section 18-12 of the Illinois Probate Act, *Ill. Rev. Stat.*, Ch. 110½, Section 18-12 (1975) provided as follows:

Section 18-12. Limitation on payment of claims.

(a) All claims against the estate of a decedent, except expenses of administration and surviving spouse's or child's awards, not filed with the representative or

the court within 6 months after the entry of the original order directing issuance of letters of office are barred as to all of the decedent's estate, unless notice is not published as provided in subsection (a) of Section 18-3 but is published as provided in subsection (b) of Section 18-3, in which event all claims not filed within 6 months after the first publication date are barred as to all of the decedent's estate; but this Section does not bar actions to establish liability of the decedent to the extent the estate is protected by liability insurance.

(b) Unless sooner barred under subsection (a) of this Section, all claims barrable under this Section are, in any event, barred unless letters of office are issued upon the estate of the decedent within 3 years after decedent's death.

3. Following this Court's decision in *Tulsa Professional Collection Services, Inc. v. Pope, Executor of the Estate of Pope* (1988), 485 U.S. 478, 108 S. Ct. 1340, 99 L.Ed.2d 565, the Illinois Probate Act was amended to provide for notice of the claim date by publication *and* by mailing or delivery to each creditor of the decedent whose name and post office address are known to or are reasonably ascertainable by the representative.

(a) Section 18-3 of the Illinois Probate Act, as amended, *Ill. Rev. Stat.*, Ch. 110½, Section 18-3 (1989) now provides as follows:

Section 18-3. Notice-Publication. (a) It is the duty of the representative to publish once each week for 3 successive weeks, and to mail or deliver to each creditor of the decedent whose name and post office address are known to or reasonably ascertainable by the representative and whose claim has not been allowed or disallowed as provided in Section 18-11, a notice stating the death of the decedent, the name and address of the representative and of his attorney

of record, that claims may be filed on or before the date stated in the notice, which date shall be not less than 6 months from the date of the first publication or 3 months from the date of mailing or delivery, whichever is later, and that any claim not filed on or before that date is barred.

(b) The published notice under subsection (a) of this Section must be published in a newspaper published in the county where the estate is being administered and may be combined with any notice under Section 6-10 or subsection (b) of Section 9-5. The representative must file proof of publication with the clerk of the court.

(b) Section 18-12 of the Illinois Probate Act, as amended, *Ill. Rev. Stat.*, Ch. 110½, Section 18-12 (1989) now provides as follows:

Section 18-12. Limitation on payment of claims.

(a) Every claim against the estate of a decedent, except expenses of administration and surviving spouse's or child's award, is barred as to all of the decedent's estate if:

(1) Notice is given to the claimant as provided in Section 18-3 and the claimant does not file a claim with the representative of the court on or before the date stated in the notice; or

(2) Notice of disallowance is given to the claimant as provided in Section 18-11 and the claimant does not file a claim with the court on or before the date stated in the notice; or

(3) The claimant or the claimant's address is not known to or reasonably ascertainable by the representative and the claimant does not file a claim with the representative or the court on or before the date stated in the published notice as provided in Section 18-3.

(b) Unless sooner barred under subsection (a) of this Section, all claims which could have been barred under this Section are, in any event, barred 2 years after decedent's death, whether or not letters of office are issued upon the estate of the decedent.

(c) This Section does not bar actions to establish liability of the decedent to the extent the estate is protected by liability insurance.

(d) Except with respect to a claimant whose claim is known to the representative and is not paid or otherwise barred under this Section, a representative who acts in good faith to determine and give notice to creditors of a decedent, as provided in Section 18-3, is not personally liable to a creditor of a decedent, but any claim not barred under this Section may be asserted against (1) the estate, to the extent that assets have not been distributed, and (2) a distributee of the estate (other than a creditor), but only to the extent that the distributee's share of the estate will not, in effect, be diminished below what the distributee would have received had the claim been paid by the representative.

STATEMENT OF THE CASE

A. THE PARTIES

Petitioner, James A. Pavela ("Pavela"), a minority shareholder in Creative Office Interiors, Inc., is the plaintiff in a stockholders derivative suit brought on behalf of the corporation against Martin J. Malone, prior to his death, and other directors and officers for breach of their fiduciary duties to the corporation. As such, Pavela is considered a creditor of the Estate of Martin J. Malone.

Respondent, Florence M. Malone ("the Executor"), is the Independent Executor of the Estate of Martin J. Malone who died after the stockholders derivative suit was filed.

B. THE ACTION BELOW

1. Proceedings in the Trial Court

(A) On August 4, 1988, Pavela filed a Verified Petition for a Declaratory Judgment that Sections 18-3 and 18-12 of the Illinois Probate Act violate the Due Process Clause (App., *infra*, E 1-7).

(B) On October 7, 1988, the Executor filed a Motion for Summary Judgment in which the Executor challenged Pavela's standing to bring the action (App., *infra*, F 1-2).

(C) On December 1, 1988, the trial court entered summary judgment in favor of the Executor and dismissed Pavela's Petition with prejudice (App., *infra*, A 1).

2. The Appeal to the Appellate Court of Illinois

Pavela filed a timely appeal. The matter was briefed and argued on February 5, 1990. The Appellate Court affirmed the trial court in a judgment entered on May 14, 1990 (App., *infra*, B 1-8).

3. The Decision of the Appellate Court of Illinois

In affirming the summary judgment entered in the trial court, the Appellate Court ruled that Pavela did not have standing to challenge the constitutionality of Sections 18-3 and 18-12 of the Illinois Probate Act because he had been given actual notice of the decedent's death and his estate being opened, and it was up to him and his attorney to have checked the files in the probate court or inquire of the Executor to learn the claim date for themselves. (App., *infra*, B 1-8).

4. Petition for Leave to Appeal to the Supreme Court of Illinois

(A) Pavela filed a timely Petition for Leave to Appeal. The Supreme Court of Illinois denied the Petition in an Order entered on October 3, 1990 (App., *infra*, C 1).

(B) Pavela filed a Motion to Stay the Mandate which was granted by the Supreme Court of Illinois. (App., *infra*, D 1-2).

5. Constitutional Issues Presented Below

Pavela has contended from the outset that due process requires that an estate's representative give actual notice of the claim date to all creditors of the decedent known or reasonably ascertainable by the representative. He set forth that constitutional claim in the pleadings he filed in the trial court and arguments he made in opposition to the Executor's Motion for Summary Judgment. He vigorously advanced that constitutional claim on appeal, in his brief, at oral argument and in his petition for leave to appeal to the Supreme Court of Illinois.

C. STATEMENT OF FACTS

1. On March 8, 1985, Pavela filed a stockholders derivative suit on behalf of Creative Office Interiors, Inc., in which he is a minority shareholder, Case Number 85 CH 2388, pending in the Chancery Division of the Circuit Court of Cook County, Illinois ("Chancery Court"). In that action, Pavela alleged that Martin J. Malone and other officers and directors breached their fiduciary duty as officers and/or directors of the corporation. Until his death on December 21, 1986, Martin J. Malone was the majority controlling shareholder in the corporation (R.C 31)

2. Martin J. Malone's will named his wife, Florence Malone, as Independent Executor and bequeathed her his entire estate (R.C 100).

3. On January 12, 1987, Letters of Office were issued to the Executor in Case Number 87 P 253 pending in the Probate Division of the Circuit Court of Cook County, Illinois ("Probate Court") (R.C 16) and during the month of January, notice of the claim date was published in the *Law Bulletin* pursuant to Section 18-3 of the Illinois Probate Act. (R.C 29).

4. On March 12, 1987, the Executor and Pavela and their respective attorneys attended a stockholders meeting of the corporation. The minutes of the meeting were transcribed by a court reporter. In pertinent part, they state as follows: (R.C 73, App. *infra*, G 3-4).

MR. FLYNN (Secretary of the corporation): This is the Annual Meeting of Shareholders of Creative Office Interiors, Inc., held pursuant to written notice to the shareholders of record.

Present this evening are Mr. James Pavela, who is a shareholder; his attorney, Mr. Marino, as is customary at shareholders meetings; Florence Malone, who is the executrix of the estate of Martin J. Malone; and the attorney for the estate, Richard A. McGrath.

I understand that under the provisions of the last will and testament of Martin J. Malone, his shares of stock in the corporation, 1500 shares, were included in the probate of the estate and are subject to administration, is that correct?

MR. MCGRATH (Attorney for Executor): That's correct.

5. Although she was aware of the pending stockholders derivative suit, neither the Executor nor her attorney,

or anyone else at the March 12, 1987, meeting disclosed to Pavela or his attorney the date the letters were issued, i.e. January 12, 1987, or the claim date, i.e. July 12, 1987, nor did Pavela receive actual notice of the claim date at any other time prior to August 24, 1987 (R.C 92-93, App., *infra*, H 2-3).

6. On August 20, 1987, Pavela's attorney served the Executor's attorney with a Motion to suggest the death of Martin J. Malone and substitute the Executor as a defendant in the pending stockholders derivative suit, pursuant to Section 2-1008 of the Illinois Code of Civil Procedure (R.C 39 and 92, App., *infra*, H 2).

7. The Executor's attorney first notified Pavela of the claim date on August 24, 1987 when he served Pavela's attorney with an objection to Pavela's Motion to substitute the Executor as a defendant (R.C 92-93, App., *infra*, H 2-3).

8. On November 4, 1987, the Chancery Court denied Pavela's Motion to substitute the Executor as a defendant in the pending stockholders derivative suit. This was a non-appealable interlocutory order (R.C 43).

9. On April 19, 1988, this Court ruled that an Oklahoma statute (similar to Sections 18-3 and 18-12 of the Illinois Probate Act), which provided only for notice by publication, was in violation of the due process clause with respect to claimants whose identities were known or reasonably ascertainable to the executor, but to whom no actual notice of the claim date was given. *Tulsa Professional Collection Services, Inc. v. Pope, Executor of the Estate of Pope* (1988), 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565.

10. On June 22, 1988, Pavela filed a motion in the pending stockholders' derivative suit requesting reconsidera-

tion of the interlocutory order entered on November 4, 1987 and granting Pavela's Motion to substitute the Executor and make her a defendant. (R.C 44-46).

11. On July 27, 1988, the Chancery Court entered an Order continuing the motion for reconsideration generally to enable Pavela to present the constitutional question to the Probate Court (R.C 47).

12. On August 4, 1988, Pavela filed a Verified Petition in the Probate Court for a Declaratory Judgment that Sections 18-3 and 18-12 of the Illinois Probate Act violate the Due Process Clause (App., *infra*, E 1-7). The Executor filed a Motion for Summary Judgment (App., *infra*, F 1-2) which was granted by the Probate Court (App., *infra*, A 1). The summary judgment was affirmed by the Appellate Court of Illinois (App., *infra*, B 1-8) and leave to appeal was denied by the Supreme Court of Illinois (App., *infra*, C 1).

REASONS FOR GRANTING THIS WRIT

This case calls upon this Court to resolve the issue—the important issue—of whether due process requires, as a minimum, that the contents of a notice (a) explain what action an interested party might take to protect his rights and (b) indicate the time limit for taking such action. It also calls upon this Court to decide whether the minimum requirements of due process with respect to the contents of a notice extend to parties represented by counsel.

Although this Court has spoken to the subject in several previous decisions, it has not specifically made rulings on

these two issues or, if it has done so, its rulings are not clear enough to be followed by the Illinois Courts.

- 1. DUE PROCESS SHOULD REQUIRE, AS A MINIMUM, THAT THE CONTENTS OF A NOTICE (A) EXPLAIN WHAT ACTION AN INTERESTED PARTY MIGHT TAKE TO PROTECT HIS RIGHTS AND (B) INDICATE THE TIME LIMIT FOR TAKING SUCH ACTION.**

In *Tulsa Professional Collection Services, Inc. v. Pope, Executor of the Estate of Pope* (1988), 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565, this Court held that the claim date in a Probate Act is not a self-executing statute of limitations, but, rather, the result of significant state action and, therefore, actual notice of the claim date had to be given to creditors known or reasonably ascertainable by the executor.

This Court's decision in *Tulsa* is the most recent in a long line of cases going back 40 years in which this Court has ruled that notice by publication is not adequate to meet the requirements of due process where the identity of the party entitled to notice is known or reasonably ascertainable by the party required to give the notice. In such cases, actual notice is required. *Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865; *New York v. New York, N.H. & H.R. Co.* (1953), 344 U.S. 293, 73 S.Ct. 299, 97 L.Ed. 333, Motion to modify den. 345 U.S. 901, 73 S.Ct. 639, 97 L.Ed. 1339; *Walker v. Hutchinson* (1956), 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d 178; *Schroeder v. New York* (1962), 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed.2d 255; *Robinson v. Hanrahan* (1972), 409 U.S. 38, 93 S.Ct. 30, 34 L.Ed.2d 47; and *Mennonite Board of Missions v. Adams* (1983), 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180.

The instant case raises an issue as to whether due process should require, as a minimum, that the contents of a notice (a) explain what action an interested party might take to protect his rights and (b) indicate the time limit for taking such action.

The facts are uncontroverted: Pavela and his attorney were informed at the March 12, 1987 stockholder's meeting that the decedent had died, that his widow was the executrix of this estate and that, under the provisions of his will, his stock was included in his probate estate (R.C 73, App., *infra*, G 3-4). The Executor knew that Pavela was a creditor of the decedent's estate, but did not give Pavela actual notice of the claim date although she and her attorney were present at the stockholders meeting and had ample opportunity to do so (R.C 92-93, App., *infra*, H 2-3). It was clearly to her advantage to say nothing about the claim date as she was the sole beneficiary under Malone's will (R.C 100).

Pavela was five weeks late in filing the claim. The claim date expired on July 12, 1987 without the knowledge of Pavela or his attorney. On August 20, 1987, Pavela's attorney served the Executor's attorney with a Motion to suggest the death of Malone and substitute the Executor as a defendant in the pending stockholders derivative action (R.C 92, App., *infra*, H 2).¹

¹ Under Illinois law, a motion filed in a pending lawsuit to substitute an executor of a deceased party, and served upon the executor, is sufficient to comply with the requirements of Section 18-1 of the Illinois Probate Act, which provides that "a claim against the estate of a decedent or ward, whether based on contract, tort or otherwise, may be filed with the representative or the Court or both." *In re Estate of Worrell* (1982), 92 Ill.2d 412, 442 N.E.2d 211 and *Berke v. First National Bank & Trust Company* (1979), 77 Ill.2d 452, 397 N.E.2d 842.

Pavela and his attorney learned for the first time on August 24, 1987 that the claim date had expired on July 12, 1987 and they learned that fact from the objection filed by the Executor to Pavela's motion to substitute her as a defendant (R.C 93, App., *infra* H 3).

In *Tulsa Professional Collection Services, Inc. v. Pope*, *supra*, this Court inferred that the actual notice should include the claim date in stating: "Moreover, the executor or executrix will often be, as is the case here, a party with a beneficial interest in the estate. This could diminish an executor's or executrix's inclination to call attention to the potential expiration of a creditor's claim. There is thus a substantial need for actual notice in this setting." *Id.* 485 U.S. at 489, 108 S.Ct. at 1347, 99 L.Ed.2d at 578.

In *Schroeder v. New York*, *supra*, this Court observed that the contents of the notice lacked certain information including the time limit for the filing of a claim in stating: "Neither the newspaper publications nor the posted notices explained what action a property owner might take to recover for the damages caused by the city's acquisition, nor did they intimate any time limit upon the filing of a claim by an affected property owner." *Id.* 371 U.S. at 210, 83 S.Ct. at 281, 9 L.Ed.2d at 258.

Illinois Courts have chosen not to follow this Court's inference in *Tulsa Professional Collection Services, Inc. v. Pope*, *supra*, and this Court's observation in *Schroeder v. New York*, *supra*, regarding the contents of the notice. The Appellate Court of Illinois has taken the position, in the instant case and a previous case, that actual notice of the decedent's death and the estate being opened is sufficient and then it is up to the creditor to check the files in the probate court or inquire of the executor to learn the claim date for himself (App., *infra*, B 7).

Previously, the Appellate Court of Illinois had ruled that claimants with knowledge of the decedent's death and the opening of an estate "had no constitutional right to have the estate or its representative explain to them the perils of delaying their ascertaining of any legal consequences which could result through further passage of time without action on their part. See *Chalaby v. Driskell* (1964), 237 Or. 245, 248, 390 P.2d 632, 633-34." *Gibbs v. Estate of Dolan* (1st Dist. 1986), 146 Ill.App.3d 203, 209, 100 Ill. Dec. 61, 496 N.E.2d 1126.²

Courts in other jurisdictions have taken the opposite position in requiring that the notice contain the claim date to comply with due process. In *Martin v. Dugger*, 686 F. Supp. 1523, 1562 (S.D. Fla. 1988), the Court stated that "In the bankruptcy context, the mere giving of notice that informs a creditor of the pendency of the action is insufficient. Under bankruptcy law, a creditor has a set time in which to file a claim. The sending of a notice without informing the creditor of the time frame in which to file a claim violates fundamental fairness. See *Reliable Electric Co., Inc. v. Olson Construction Co.*, 726 F.2d 620 (10th Cir. 1984). In such a situation, the creditor would appear at the hearing, yet would not be provided with an opportunity to present his side, for his claim would be time barred."

² Illinois Courts have expressed a different view in deciding that an executor's actual knowledge of a claim does not relieve the claimant of following the statutorily prescribed claims procedure. *Morse v. Pacific Ry. Co.* (1901), 191 Ill. 356, 361, 61 N.E. 104; *In re Estate of Garawany* (2nd Dist. 1980), 80 Ill.App.3d 401, 404, 35 Ill.Dec. 735, 399 N.E.2d 1024; *In re Estate of Newcomb* (3rd Dist. 1972), 6 Ill.App.3d 1094, 1096-1097, 287 N.E.2d 141; *In re Estate of Worrell* (1982), 92 Ill.2d 412, 418-419, 442 N.E.2d 211.

Also, in *Armstrong v. Armstrong*, 130 F.R.D. 449, 453 (D. Colo. 1990), a probate case, the court held: "However, based upon the Supreme Court's holding in *Pope, supra*, I can conclude that the relevant inquiry is not whether defendants had actual knowledge that decedent's estate was open, but rather, whether defendants had actual notice of the deadline for filing claims against decedent's estate."

In another case, *In re Rogowski*, 115 B.R. 409 (Bkrcty, D. Conn. 1990), the Court ruled that a mortgagee's actual notice of a bankruptcy case did not constitute actual notice of the bar date for filing a complaint to determine dischargeability of a claim.

The Appellate Court of Illinois defined the issue in the instant case as follows:

"... the sole issue before this court is whether, as a matter of law, petitioner had received actual notice of the claim period, thereby denying him standing to allege that the publication notice provisions of sections 18-3 and 18-12 of the Act are unconstitutional." (App., *infra* B 4).

The Appellate Court of Illinois then ruled that it was not necessary that the information given Pavela and his attorney at the shareholder's meeting include *actual notice of the claim period* because "By merely checking the estate's probate file for the date on which letters of office were issued or by inquiring of respondent as to when they were issued, petitioner would have learned when the statutory claim period had commenced to run." (App., *infra* B 7).³

³ Section 18-3 of the Illinois Probate Act expressly requires the notice to set forth the claim date. It places no duty on the creditor or his attorney to check the court files and determine the claim

(Footnote continued on following page)

This ruling is contrary to this Court's decision in *New York v. New York, N.H. & H.R. Co.*, *supra*, which involved a railroad reorganization proceeding under the federal bankruptcy statute that required "reasonable notice" to interested parties. This Court ruled that notice by publication was not enough to bar the City of New York's claim which was not filed within the applicable time period and rejected the argument that the City's knowledge of the railroad reorganization required it to make inquiry for itself in stating:

"Nor can the bar order against New York be sustained because the City's knowledge that reorganization of the railroad was taking place in the court. The argument is that such knowledge puts a duty on creditors to inquire for themselves about possible court orders limiting the time for filing claims. But even creditors who have a knowledge of a reorganization have a right to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred. When the judge ordered notice by mail to be given the appearing creditors, New York City acted reasonably in waiting to receive the same treatment.

The statutory command for notice embodies a basic principle of justice—that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights. New York City has not been accorded

³ *continued*

date for themselves. This was true under both Section 18-3, as it existed during the time period applicable to this case, which required only notice by publication, and under Section 18-3, as it now exists, which requires both notice by publication and notice by mail or delivery to creditors whose name and post office address are known or reasonably ascertainable by the representative. *Ill. Rev. Stat.*, Ch. 110½, Section 18-3 (1975) and *Ill. Rev. Stat.*, Ch. 110½, Section 18-3 (1989).

that kind of notice.” *Id.* 344 U.S. at 297, 73 S.Ct. at 301, 97 L.Ed. at 337.

This Court should take this case and answer the issue presented with a positive “Yes” for all to hear: “Yes, due process does require, as a minimum, that the contents of a notice explain what action an interested party might take to protect his rights and Yes, due process does require, as a minimum, that the contents of a notice indicate the time limit for taking such action.”

2. THE MINIMUM REQUIREMENTS OF DUE PROCESS WITH RESPECT TO THE CONTENTS OF A NOTICE SHOULD EXTEND TO PARTIES WHO ARE REPRESENTED BY COUNSEL.

This case presents the following questions: Should the requirements of due process be any less or, at least, any different for parties represented by counsel? Are they entitled to actual notice of the claim date or is it enough to just give them notice that an estate has been opened? Because they are represented by counsel, do such parties have an obligation to check the files in the probate court and determine the claim date for themselves?

In the instant case, the Appellate Court of Illinois hit hard on the fact that Pavela was represented by counsel and did two things. First, it excused the Executor from having to give actual notice of the claim date to Pavela and, secondly, it placed the burden on Pavela and his attorney to check the files of the Probate Court and determine the claim date for themselves. The Appellate Court stated:

“ . . . petitioner’s argument that he did not receive sufficient information at the shareholders’ meeting to notify him of the duration of the statutory claim period is more akin to an ignorance of the law

defense than a due process claim. It is axiomatic that everyone is presumed to know the law. (*Reed v. Albanese* (1966), 78 Ill. App.2d 53, 223 N.E.2d 419.) *This is particularly true of attorneys.* Both petitioner and his attorney were present at the shareholders' meeting when Creative's secretary reported on Malone's death, on respondent's appointment as executor of Malone's estate and on the transfer of Malone's shares to respondent. Petitioner and petitioner's attorney are presumed to know, at the very least, that they must substitute a party for the decedent in the pending claim and that they must do so pursuant to the relevant law. By merely checking the estate's probate file for the date on which letters of office were issued or by inquiring of respondent as to when they were issued, petitioner would have learned when the statutory claim period had commenced to run. Instead, petitioner did nothing for more than five months. In our view, petitioner's failure to timely file his motions is not the result of insufficiency of actual notice; it is the result of failure to timely act on the notice received. Therefore, we conclude that petitioner had sufficient actual notice at the time of the shareholders' meeting to file his motion to suggest the death and his motion to substitute respondent in the pending suit within the statutory claim period." (Emphasis Added) (App., *infra*, B 6-7).

The instant case raises an issue as to whether the minimum requirements of due process with respect to the contents of a notice should extend to parties represented by counsel. This Court has not ruled on this issue as it relates to parties with attorneys, but it has done so with respect to parties who are "well versed in commercial practices." In *Mennonite Board of Missions v. Adams*, *supra*, a case involving real estate tax sales, this Court ruled that even sophisticated creditors with the means at their disposal to discover the information for themselves

are entitled to actual notice thereof. This Court there stated:

“personal service or mailed notice is required even though sophisticated creditors have means at their disposal to discover whether property taxes have not been paid and whether tax-sale proceedings are therefor likely to be initiated.” *Id.* 462 U.S. at 799, 103 S.Ct. at 2712, 77 L.Ed.2d at 188.

Going further, this Court noted “. . . a party’s ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation,” and “. . . it does not follow that the State may forego even the relatively modest administrative burden of providing notice by mail to parties who are particularly resourceful. Cf. *New York City v. New York, N.H. & H.R. Co.*, 344 U.S. at 297.” *Id.* 462 U.S. at 799-800, 103 S.Ct. at 2712, 77 L.Ed.2d at 188.

In *New York v. New York, N.H. & H.R. Co.*, *supra*, the City of New York had an extensive legal staff available to check court files on a railroad reorganization and determine the time limitation for filing claims. Yet, this Court found that the City was still entitled to notice by mail of the claim date and had no duty to check the court files. *Id.* 344 U.S. at 297, 73 S.Ct. at 301, 97 L.Ed. at 337.

In *Mennonite Board of Missions v. Adams*, *supra*, this Court ruled that the same treatment must be given to any party whose liberty or property interests will be adversely affected—“whether unlettered or well versed in commercial practices.” *Id.* 462 U.S. at 800, 103 S.Ct. at 2712, 77 L.Ed.2d at 188. Driving the nail home, the Court held that:

“. . . a mortgagee’s knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending. The latter ‘was the information

which the (county) was constitutionally obliged . . . to give personally to the appellant—an obligation which the mailing of a single letter would have discharged.’ *Schroeder v. New York City*, 371 U.S., at 214” (Emphasis added) *Id.* 462 U.S. at 800, 103 S.Ct. at 2712, 77 L.Ed.2d at 188.

Courts in jurisdictions other than Illinois have not treated parties represented by counsel differently than unrepresented parties. Unlike Illinois Courts, they have not placed upon parties represented by counsel the burden of checking the court files for the claim date. In *Reliable Electric Co., Inc. v. Olson Construction Co.*, 726 F.2d 620 (10th Cir. 1984), a bankruptcy case, the debtor contended that the claimant was adequately notified of the claim period because its attorney had actual knowledge of the reorganization proceeding. The Court rejected that argument and ruled “Although Olson’s attorney was generally aware of Reliable’s involvement in reorganization proceedings, Olson was essentially denied the opportunity to be heard at the confirmation hearing” *Id.* 726 F.2d at 622. Also, see *Martin v. Dugger*, *supra*; *Armstrong v. Armstrong*, *supra*; and *In re Rogowski*, *supra*, (all of which were cases involving parties represented by counsel).

This Court should take this case and answer the issue presented with a resounding “Yes” which shall be heeded by lower courts in Illinois and elsewhere: “Yes, the minimum requirements of due process with respect to the contents of notice does extend to parties who are represented by counsel.”

CONCLUSION

This Court has ruled that due process requires actual notice (and not notice by publication) where the party whose rights will be adversely affected is known or reasonably ascertainable to the party required to give the notice. Having settled the issue as to the *method* of notice, this Court now needs to resolve the issues presented by the instant case regarding the *contents* of the notice and whether parties *represented by counsel* are entitled to notice with the same contents as parties who do not have an attorney. The air needs to be cleared and this is the right case to do it. It is submitted that Pavela's Petition should be granted.

December 28, 1990

Respectfully submitted,

CHARLES F. MARINO

Counsel of Record

DAVID M. MARINO

39 South LaSalle Street

Suite 1424

Chicago, Illinois 60603

(312) 236-4260

Attorneys for Petitioner

APPENDICES



INDEX TO APPENDICES

	PAGE
APPENDIX A	
FINAL JUDGMENT ORDER, ENTERED BY CIRCUIT COURT OF COOK COUNTY, ILLI- NOIS ON DECEMBER 1, 1988 GRANTING SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENT, FLORENCE M. MALONE, AS EXECUTRIX OF THE ESTATE OF MARTIN J. MALONE, AND AGAINST THE PETITION- ER, JAMES A. PAVELA, AND DISMISSING THE PETITION OF JAMES A. PAVELA WITH PREJUDICE	A-1
APPENDIX B	
OPINION OF APPELLATE COURT OF ILLI- NOIS DATED MAY 14, 1990, AFFIRMING DECISION OF CIRCUIT COURT OF COOK COUNTY, ILLINOIS	B-1
APPENDIX C	
ORDER OF THE SUPREME COURT OF ILLI- NOIS, DATED OCTOBER 3, 1990, DENYING THE PETITION FOR LEAVE TO APPEAL ..	C-1
APPENDIX D	
ORDER OF THE SUPREME COURT OF ILLI- NOIS, DATED OCTOBER 23, 1990, STAYING MANDATE PENDING FILING OF PETITION FOR WRIT OF CERTIORARI AND RESOLU- TION THEREOF BY SUPREME COURT OF THE UNITED STATES	D-1

APPENDIX E

VERIFIED PETITION FOR DECLARATORY
JUDGMENT THAT SECTIONS 18-3 AND 18-12
OF THE PROBATE ACT VIOLATE THE DUE
PROCESS CLAUSE AND FOR LEAVE TO
FILE A CLAIM FILED IN THE CIRCUIT
COURT OF COOK COUNTY, ILLINOIS ON
AUGUST 4, 1988 E-1

APPENDIX F

RESPONDENT'S MOTION FOR SUMMARY
JUDGMENT FILED IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS ON OCTOBER
7, 1988 F-1

APPENDIX G

AFFIDAVIT OF RICHARD A. McGRATH, AT-
TORNEY FOR THE ESTATE OF MARTIN J.
MALONE, IN SUPPORT OF RESPONDENT'S
MOTION FOR SUMMARY JUDGMENT FILED
IN THE CIRCUIT COURT OF COOK COUNTY,
ILLINOIS ON OCTOBER 7, 1988 G-1

APPENDIX H

PETITIONER'S AFFIDAVIT IN OPPOSITION
TO RESPONDENT'S MOTION FOR SUMMARY
JUDGMENT FILED IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS ON NOVEM-
BER 1, 1988 H-1

A-1

APPENDIX A

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—PROBATE DIVISION

Estate of	)	No. 87 P 253
)	
MARTIN J. MALONE	)	Docket 934
)	
	)	Page 206

ORDER

This cause coming to be heard on Motion of Florence M. Malone, Executrix of the Estate of Martin J. Malone, for summary judgment, due notice having been given and the Court having considered the briefs and arguments of counsel:

It is hereby ordered that summary judgment be granted in favor of Florence M. Malone as executrix of the Estate of Malone and against the Petitioner James A. Pavela and further that the Petition of James A. Pavela be dismissed with prejudice.

It is further ordered that no just cause exists to delay enforcement or appeal of this final order.

ENTER

December 1, 1988

/s/ Frank R. Petrone

Judge's No. 7861



APPENDIX B

In re)	
)	
ESTATE OF MARTIN J. MALONE)	
)	
JAMES A. PAVELA,	)	Appeal from the
Petitioner-Appellant	)	Circuit Court
	)	of Cook County
v.)	
)	
FLORENCE M. MALONE, as	)	Honorable
independent executor,	)	Frank R. Petrone,
Respondent-Appellee	)	Judge Presiding

No. 1-88-3522

Appellate Court of Illinois
First District, First Division

May 14, 1990

JUSTICE CAMPBELL delivered the opinion of the court:

Petitioner, James A. Pavela, appeals from an order entered by the circuit court granting summary judgment in favor of respondent Florence M. Malone, executor of the estate of Martin J. Malone, and dismissing petitioner's cause of action with prejudice. Petitioner had sought: (1) a declaratory judgment that sections 18-3 and 18-12 of the Probate Act of 1975 (the "Act") (Ill. Rev. Stat. 1987, ch. 110 1/2, par. 18-3, 18-12) violated the due process clause of the Federal and Illinois constitutions, and (2) leave to file his motion to suggest the death of Martin J. Malone and to substitute the independent executor of Malone's estate as a defendant in a pending shareholders' derivative action. On appeal, petitioner contends that: (1) he has

standing to challenge the constitutionality of sections 18-3 and 18-12 of the Act, and (2) sections 18-3 and 18-12 of the Act violate his constitutional right to due process.

The record indicates that prior to his death, Martin J. Malone was president, director and majority shareholder of Creative Office Interiors, Inc. ("Creative"). Petitioner was a shareholder of Creative. On March 8, 1985, petitioner filed a stockholders' derivative action on Creative's behalf, alleging that Martin J. Malone and others had breached their fiduciary duty to Creative. On December 21, 1986, during the pendency of the derivative action, Malone died testate. Malone's will named his wife, Florence (respondent), as independent executor and bequeathed Florence his entire estate.

Pursuant to Section 18-3 of the Act, respondent published notice of Malone's death on January 15, 22 and 29, 1987, in the *Chicago Daily Law Bulletin*. The notice indicated that Letters of Office had been issued on January 12, 1987, and that any claim against the estate had to be filed within 6 months of that date.

Thereafter, on March 12, 1987, Creative's annual shareholders' meeting was held. Present at the meeting were respondent, petitioner, their respective attorneys, and James Flynn, secretary of Creative. At the meeting, Flynn confirmed that respondent had been named independent executor of Malone's estate, that Malone's 1500 shares of Creative stock had been transferred to respondent pursuant to Malone's will and that the shares would be probated in his estate. Respondent, petitioner and two other individuals were then elected directors of Creative. Additional business was discussed which is not of record.

On August 26, 1987, petitioner filed his motion to suggest the death of Martin Malone and to substitute respon-

dent, the independent executor of Malone's estate, as a defendant in the shareholders' derivative action. On November 4, 1987, petitioner's motion was denied on the grounds that the six-month statutory claim period set forth in section 18-12 of the act had expired. Malone was then dismissed as a party defendant to the shareholders' derivative action.

Thereafter, petitioner filed a motion for reconsideration, predicated on *Tulsa Professional Collection Services, Inc. v. Pope* (1988), 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565, which held that due process required that reasonably ascertainable creditors of an estate "be given notice by mail or by other means as certain to ensure actual notice." (198 S.Ct. 1340, 1348, quoting *Mennonite Board of Missions v. Adams* (1983), 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180.) Petitioner argued that because he was a known claimant of Malone's estate who had been given only publication notice, he had been denied due process and his original motion to substitute the independent executor should have been granted. In an order dated July 27, 1988, the trial court continued petitioner's motion for reconsideration to enable petitioner to present the question regarding the constitutionality of sections 18-3 and 18-12 of the Act to the probate court.

On August 4, 1988, petitioner filed in the probate court a "verified petition for a declaratory judgment that sections 18-3 and 18-12 of the Probate Act violate the due process clause and for leave to file a claim herein." In his petition, petitioner alleged the chronology of events up to that time, including an allegation that he had first learned of the statutory claim date in August, 1987 when respondent responded to his motion to substitute. Petitioner further alleged that pursuant to *Tulsa*, sections 18-3 and 18-12 of the Act violate the due process provisions

of the Federal and Illinois constitutions. Petitioner requested a declaration that sections 18-3 and 18-12 of the Act were unconstitutional and further requested leave to file a claim regarding the shareholders' actions. The probate court granted petitioner leave to file his petition. Respondent then moved for summary judgment, which was granted. In entering summary judgment, the trial court declined to rule on the issue of constitutionality and predicated its determination on the fact that petitioner and his attorney had had actual notice of Malone's death within the 6-month claim period and, therefore, lacked standing to bring a claim alleging the unconstitutionality of sections 18-3 and 18-12 of the Act. Petitioner appealed.

The purpose of summary judgment is to render expeditious judgment on questions of law after first deciding that no genuine issue as to any material fact exists between the parties. (*Kusiciel v. LaSalle National Bank* (1982), 106 Ill.App.3d 333, 435 N.E.2d 1217.) In the present case, there is no dispute as to the facts underlying the cause of action. Rather, the sole issue before this court is whether, as a matter of law, petitioner had received actual notice of the claim period, thereby denying him standing to allege that the publication notice provisions of sections 18-3 and 18-12 of the Act are unconstitutional.

In *Mennonite Board of Missions v. Adams* (1983), 462 U.S. 791, 800, 103 S.Ct. 2706, 2712, 77 L.Ed.2d 180, 188, the Supreme Court held that, "Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." In determining whether notice given in a par-

ticular circumstance is sufficient to "ensure actual notice," the Supreme Court has looked at four factors ("actual notice factors"): (1) whether the form of notice relies on mere chance to reach the attention of the other party (*Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865); (2) whether the form of notice is designed to attract the attention of the other party (*Mennonite Board of Missions*); (3) whether the actual means of providing notice is reliable (*Greene v. Lindsey* (1982), 456 U.S. 444, 102 S.Ct. 1874, 72 L.Ed.2d 249); and (4) whether the means of notice was reasonable when compared to the other alternatives. *Greene v. Lindsey*.

In the present case, on March 12, 1987, three months before the expiration of the statutory claim period, petitioner and his attorney attended Creative's annual shareholders' meeting. At the meeting, James Flynn, Creative's secretary, mentioned that respondent had been named independent executor of Malone's estate and that Malone's 1500 shares of Creative stock had been transferred to respondent pursuant to Malone's will and would be probated with the estate. Application of these facts to the actual notice factors indicates that petitioner had sufficient actual notice at the time of the meeting to file his motions. First, the information conveyed at the meeting did not rely on chance to bring notice to petitioner of Malone's death, of respondent's appointment as executor, and of the transfer of Malone's shares. The meeting was an annual shareholders' meeting, which petitioner, as a shareholder, attended. Second, the Secretary's report was specifically prepared to be read to the shareholders and was intended to attract their attention. Third, the report was reliable, and fourth, it was a reasonable means by which to convey the information relevant to the shareholders.

Although notice by mail could also have conveyed this information to petitioner, the Supreme Court has not held that mail notice is necessary in every situation where notice is required. The Court merely held that the form of notice must be certain to ensure actual notice. *Mullane*.

With respect to the content of the actual notice, petitioner argues that actual notice should contain the same information statutorily required of publication notice and that the extended claim period for delayed publication should apply to delayed actual notice. Without supporting authority, petitioner asserts that "there is no reason" for not extending the publication notice requirements to actual notice. Contrary to petitioner's contention, there is a fundamental reason why the publication notice requirements of section 18-3 of the Act should not be extended to actual notice: the legislature expressly limited section 18-3 to publication and it is not within the province of this court to rewrite statutory law. Rather, this court's function is to interpret the law. *Ralston v. Plogger* (1985), 132 Ill. App.3d 90, 476 N.E.2d 1378.

Moreover, petitioner's argument that he did not receive sufficient information at the shareholders' meeting to notify him of the duration of the statutory claim period is more akin to an ignorance of the law defense than a due process claim. It is axiomatic that everyone is presumed to know the law. (*Reed v. Albanese* (1966), 78 Ill. App.2d 53, 223 N.E.2d 419.) This is particularly true of attorneys. Both petitioner and his attorney were present at the shareholders' meeting when Creative's secretary reported on Malone's death, on respondent's appointment as executor of Malone's estate and on the transfer of Malone's shares to respondent. Petitioner and petitioner's attorney are presumed to know, at the very least, that

they must substitute a party for the decedent in the pending claim and that they must do so pursuant to the relevant law. By merely checking the estate's probate file for the date on which letters of office were issued or by inquiring of respondent as to when they were issued, petitioner would have learned when the statutory claim period had commenced to run. Instead, petitioner did nothing for more than five months. In our view, petitioner's failure to timely file his motions is not the result of insufficiency of actual notice; it is the result of failure to timely act on the notice received. Therefore, we conclude that petitioner had sufficient actual notice at the time of the shareholders' meeting to file his motion to suggest the death and his motion to substitute respondent in the pending suit within the statutory claim period.

Our decision that petitioner received sufficient actual notice within the statutory period to have timely filed his motions obviates the need to discuss the constitutionality of sections 18-3 and 18-12 of the Act, which relate to publication notice to known creditors, or to discuss the retroactive application of *Tulsa Professional Collection Services, Inc. v. Pope* (1988), 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565, which declared a deprivation of due process as to creditors who had not received actual notice. (See *Missouri Highway & Transportation Commission v. Myers* (Mo. 1990), 785 S.W.2d 70.) Our decision as to actual notice also renders *Rose v. Kaszynski* (1988), 178 Ill. App.3d 266, 533 N.E.2d 73, relied upon by petitioner, distinguishable from the facts in the present case. In *Rose*, the trial court granted a creditor's motion to join the executrix in a pending lawsuit even though the motion had not been filed until 10 months after letters of office were issued. In affirming the trial court's decision, the appellate court found that defendant had not been given actual no-

tice of the death. Therefore, his due process rights had been violated. As stated, in the present case, both petitioner and his attorney had sufficient actual notice to file their motions three months before the expiration of the claim period.

Accordingly, for the aforementioned reasons, the judgment of the circuit court of Cook County is affirmed.

Affirmed.

BUCKLEY, P.J. and O'CONNOR, JR., J., concur.

C-1

APPENDIX C

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

October 3, 1990

Mr. Charles F. Marino
Attorney at Law
39 S. LaSalle, S#817
Chicago, IL 60603

No. 70382—James A. Pavela, petitioner, v. Florence M. Malone, etc., respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 25, 1990.



D-1

APPENDIX D

No. 70382
IN THE
SUPREME COURT OF ILLINOIS

James A. Pavela,)	
)	
Petitioner	)	ACI-88-3522
)	
v.	)	TR87P253
	)	Hon.
Florence M. Malone, etc.,	)	Frank R. Petrone
	)	Judge Presiding
Respondent)	

ORDER

This matter has come for consideration upon the motion of petitioner, James A. Pavela, to stay the mandate of this Court pending appeal or application for *certiorari* in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is stayed pending the filing of a notice of appeal or an application for *certiorari* or the expiration of the period within which said application or notice may be filed. If *certiorari* is applied for or notice of appeal filed, the mandate of this Court shall, upon proof of such filing being made by affidavit filed with the clerk of this Court, be further stayed pending resolution by the United States Supreme Court of such application or appeal. If no affidavit is filed, the mandate shall, without

D-2

further order, issue upon the expiration of the time within which appeal or *certiorari* may be sought.

FILED
October 23, 1990

/s/ William G. Clark
Justice,
Supreme Court of Illinois

Chicago
Supreme Court Clerk

E-1

APPENDIX E

Filed August 4, 1988

Morgan M. Finley, Clerk-Circuit Court

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—PROBATE DIVISION

Estate of	)	No. 87 P 253
)	
MARTIN J. MALONE	)	Docket 934
)	
	)	Page 206

VERIFIED PETITION FOR A DECLARATORY
JUDGMENT THAT SECTIONS 18-3 AND 18-12
OF THE PROBATE ACT VIOLATE THE
DUE PROCESS CLAUSE AND FOR LEAVE
TO FILE A CLAIM HEREIN

The Petitioner, James A. Pavela, by and through his attorney, Charles F. Marino, petitions the Court for a declaratory judgment that Sections 18-3 and 18-12 of the Probate Act violate the due process clause of the Federal and Illinois Constitutions and for leave to file a claim herein. As grounds and reasons therefor, the Petitioner states as follows:

1. On March 8, 1985, the Petitioner filed a stockholders derivative suit on behalf of Creative Office Interiors, Inc., in which he is a minority shareholder, Case No. 85 CH 2388, pending in the Circuit Court of Cook County, Illinois. In that action, the Plaintiff alleged that Martin J.

Malone and others breached their fiduciary duty to Creative Office Interiors, Inc.

2. Until he died on December 21, 1986, Martin J. Malone was the majority controlling shareholder in Creative Office Interiors, Inc. with 1,500 shares of stock.

3. Following Martin J. Malone's death, this Court issued letters of office to Florence M. Malone, as independent executor, on January 12, 1987.

4. Sections 18-3 and 18-12 of the Probate Act provide only for notice of the claim date by publication.

a. Section 18-3 provides as follows:

Sec. 18-3. Publication. (a) It is the duty of the representative to publish once each week for 3 successive weeks, commencing within 14 days after the issuance of letters of office, a notice informing all persons of the death of the decedent, the date of issuance of the letters, the name and address of the representative and of his attorney of record and that claims may be filed within 6 months from the date of issuance of the letters and that any claim not filed within that period is barred.

(b) If notice is not published as provided in subsection (a) of this Section, it is the duty of the representative to publish once each week for 3 successive weeks a notice informing all persons of the death of the decedent, the date of issuance of the letters, the name and address of the representative and of his attorney of record and that claims may be filed within 6 months from the first publication date and that any claim not filed within that period is barred.

(c) The notice under subsection (a) or (b) of this Section must be published in a newspaper published in the county where the estate is be-

ing administered and may be combined with any notice under Section 6-10 or subsection 28-2(c). The representative must file proof of publication with the clerk of the court.

b. Section 18-12 provides as follows:

Section 18-12. Limitation on payment of claims.

(a) All claims against the estate of a decedent, except expenses of administration and surviving spouse's or child's awards, not filed with the representative or the court within 6 months after the entry of the original order directing issuance of letters of office are barred as to all of the decedent's estate, unless notice is not published as provided in subsection (a) of Section 18-3 but is published as provided in subsection (b) of Section 18-3, in which event all claims not filed within 6 months after the first publication date are barred as to all of the decedent's estate; but this Section does not bar actions to establish liability of the decedent to the extent the estate is protected by liability insurance.

(b) Unless sooner barred under subsection (a) of this Section, all claims barrable under this Section are, in any event, barred unless letters of office are issued upon the estate of the decedent within 3 years after decedent's death.

5. Notice of the claim date, i.e., July 12, 1987, as required by Sections 18-3 and 18-12 of the Probate Act, was published in the *Law Bulletin* on January 15, January 22, and January 29, 1987.

6. The Petitioner was not given actual notice of the claim date by Florence Malone, as independent executor, even though she had succeeded Martin J. Malone as president, director and controlling shareholder of Creative Office Interiors, Inc. and had knowledge of the pending shareholders derivative action and the Plaintiff's identity.

7. On August 20, 1987, the Petitioner's attorney served Richard A. McGrath, attorney for the estate of Martin J. Malone, with a motion to suggest the death of Martin J. Malone and substitute Florence M. Malone, independent executor of his estate, as a party defendant in the pending shareholders derivative action, pursuant to Section 2-1008 of the Illinois Code of Civil Procedure. A copy of said motion is attached hereto as Exhibit A.

8. Section 2-1008(b) of the Illinois Code of Civil Procedure provides, in pertinent part, as follows:

(b) Death. If a party to an action dies and the action is one which survives, the proper party or parties may be substituted by order of court upon motion. If a motion to substitute is not filed within 90 days after the death is suggested of record, the action may be dismissed as to the deceased party.

* * *

If a legal representative is appointed for the estate before judgment is entered, and his or her appointment is suggested of record in the action, the court shall order that the representative be substituted for the special administrator.

9. A motion filed in a pending lawsuit to substitute an executor of a deceased party, and served upon the executor, is sufficient to comply with the requirements of Section 18-1 of the Probate Act, which provides that, "A claim against the estate of a decedent or ward, whether based on contract, tort or otherwise, may be filed with the representative or the court or both." *In re Estate of Worrell* (1982), 92 Ill.2d 412, 442 N.E.2d 211, and *Berke v. First National Bank & Trust* (1979), 77 Ill.2d 452, 397 N.E.2d 842.

10. Richard A. McGrath first notified Petitioner of the claim date in Martin J. Malone's estate on August 24, 1987, when he served Petitioner's attorney with an objection to Petitioner's motion, asserting that the Petitioner had failed to comply with Section 18-12 of the Probate Act, in that a claim had not been filed with the representative or the court within six months of the issuance of letters of office.

11. On November 4, 1987, the Honorable Judge Anthony Scottillo denied the Petitioner's motion to substitute Florence M. Malone, independent executor, as a party defendant in the pending shareholders derivative action. A copy of said order is attached hereto and made a part hereof as Exhibit B.

12. Thereafter, on April 19, 1988, the United States Supreme Court ruled that an Oklahoma statute (similar to Sections 18-3 and 18-12 of the Probate Act), which provided only for notice by publication was in violation of the due process clause with respect to claimants whose identities were known or reasonably ascertainable to the executor, but to whom no actual notice of the claim date was given. *Tulsa Professional Collection Services, Inc. v. Pope, Executor of the Estate of Pope*, a copy of which is attached hereto.

13. Section 1 of the Fourteenth Amendment to the Federal Constitution provides, in pertinent part, that "nor shall any state deprive any person of life, liberty, or property, without due process of law." Section 2 of Article I of the Illinois Constitution provides, in pertinent part, that, "No person shall be deprived of life, liberty or property without due process of law."

14. Sections 18-3 and 18-12 of the Probate Act are in violation of the due process clause of the Federal and Illi-

nois Constitutions insofar as they provide only for notice of the claim date by publication and do not require actual notice of the claim date to claimants whose identities are known or reasonably ascertainable to the executor.

15. On June 22, 1988, the Petitioner filed a Motion for Reconsideration in the shareholders derivative suit requesting Judge Scotillo to reconsider the order entered on November 4, 1987 and grant the Petitioner's motion to substitute the independent executor and make her a party defendant in the shareholders derivative action, a copy of which is attached hereto as Exhibit C.

16. On July 27, 1988, Judge Scotillo entered an order continuing the Motion for Reconsideration generally to enable the Petitioner to present the question herein to the Probate Court. A copy of said order is attached hereto as Exhibit D.

17. A notice has been served upon the Attorney General of Illinois, pursuant to Illinois Supreme Court Rule 19, that the constitutionality of Sections 18-3 and 18-12 of the Probate Act will be raised in this proceeding. A copy of said notice is attached hereto as Exhibit E.

WHEREFORE, the Petitioner prays as follows:

1. for a declaratory judgment, pursuant to Section 2-701 of the Illinois Code of Civil Procedure, that Sections 18-3 and 18-12 of the Probate Act violate the due process of the Federal and Illinois Constitutions insofar as they provide only for notice by publication and do not require actual notice of the claim date to claimants whose identities are known or reasonably ascertainable to the executor;

2. for leave to file the claim attached hereto as Exhibit F with respect to the pending shareholders derivative action; and

E-7

3. for such other or further relief as this Court may deem proper.

/s/ Charles F. Marino
Charles F. Marino,
Attorney for the Petitioner

39 S. LaSalle
Chicago, Illinois
(312) 236-4260
Attorney No. 06471

VERIFICATION

James A. Pavela, being first duly sworn on oath, deposes and says that he is the Petitioner herein; that he has read the above and foregoing Petition for a Declaratory Judgment that Sections 18-3 and 18-12 of the Probate Act Violate the Due Process Clause and for Leave to File a Claim herein; and that the facts contained therein are true to the best of his knowledge, information and belief.

/s/ James A. Pavela
James A. Pavela

Subscribed and Sworn to before me
this 29th day of July, 1988.

/s/ Charles F. Marino
Notary Public

F-1

APPENDIX F

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, PROBATE DIVISION

Estate of	)	No. 87 P 253
)	
MARTIN J. MALONE	)	Docket 934
)	
	)	Page 206

**RESPONDENT'S MOTION FOR
SUMMARY JUDGMENT**

NOW COMES Respondent, FLORENCE M. MALONE, AS Executrix of the Estate of MARTIN J. MALONE, deceased, by her undersigned attorneys, and for the reasons set forth in the attached Memorandum of Law respectfully moves for the following relief:

1. Summary judgment in her favor and against petitioner;
2. That petitioner's request that Sections 18-3 and 18-12 of the probate Act be declared to violate the due process clause be denied;
3. That petitioner's request for leave to file a probate claim be denied.

F-2

Richard A. McGrath
111 West Washington
Street
Chicago, Illinois
(312) 782-3470
(For the Estate)

Respectfully submitted,

By: /s/ Eric Samore

Eric Samore
QUERREY & HARROW, LTD.
135 So. LaSalle Street
Suite 3600
Chicago, Il 60603
(312) 236-9850
(Additional Counsel for
the Estate)

G-1

APPENDIX G

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, PROBATE DIVISION

Estate of	)	No. 87 P 253
)	
MARTIN J. MALONE	)	Docket 934
)	
	)	Page 206

AFFIDAVIT

I, Richard A. McGrath, being duly sworn and upon oath if called upon, could testify to the following facts for my own personal knowledge:

1. I am an attorney representing the estate of Martin J. Malone.
2. I was present at the March 12, 1987 Annual Meeting of Shareholders of Creative Office Interiors, held at 225 W. Ohio, Street, Chicago, Illinois.
3. A copy of the transcript of proceedings through page 4 is attached hereto as Exhibit "A".
4. The transcript marked as Exhibit "A" truly and accurately recorded the substance of the statements and comments made at that meeting by those in attendance; and for the portion of the meeting that is transcribed, there are no omissions.

G-2

5. Further affiant sayeth not.

/s/ Richard A. McGrath
Richard A. McGrath
Attorney for the Estate
of Martin J. Malone

Subscribed and sworn to
before me this 5th day
of October, 1988.

/s/ Dorothy L. Milani
Notary Public

EXHIBIT "A"
THE ANNUAL MEETING OF SHAREHOLDERS
OF
CREATIVE OFFICE INTERIORS, INC.

Stenographic Report of Proceedings had at the Annual Meeting of Shareholders of Creative Office Interiors, Inc., held pursuant to notice at 225 W. Ohio Street, Chicago, Illinois, on March 12, 1987, at the hour of 5:30 o'clock p.m.

PRESENT:

MR. JAMES J. FLYNN, Secretary;

MRS. FLORENCE MALONE, Executrix
of the Estate of Mr. Martin J.
Malone, Deceased;

MR. JAMES A. PAVELA, Shareholder;

MR. CHARLES F. MARINO, Attorney,
on behalf of Mr. James A. Pavela;

MR. RICHARD A. MCGRATH, Attorney,
on behalf of the Estate of
Mr. Martin J. Malone;

MR. JAMES MALONE.

MR. FLYNN: This is the Annual Meeting of Shareholders of Creative Office Interiors, Inc., held pursuant to written notice to the shareholders of record.

Present this evening are Mr. James Pavela, who is a shareholder; his attorney, Mr. Marino, as is customary at shareholders meetings; Florence Malone, who is the executrix of the estate of Martin J. Malone; and the attorney for the estate, Richard A. McGrath.

I understand that under the provisions of the last will and testament of Martin J. Malone, his shares of stock

in the corporation, 1500 shares, were included in the probate of the estate and are subject to administration, is that correct?

MR. McGRATH: That's correct.

MR. FLYNN: It appears to be that all the shareholdings of the corporation are represented in person, and there is a quorum to proceed.

I might add that the meeting is being held pursuant to written notice which was corrected by a second notice to set out the time of the meeting.

The financial statements I believe were mailed out.

MR. PAVELA: Yes, I received them.

MR. FLYNN: You have a copy of those.

The first order of business, I believe, would be the election of directors by the shareholders for the coming year.

As we well know, the corporation has four directors. Each shareholder is entitled under Illinois law to accumulate the votes represented by his shares in the election for directors, which means that each shareholder has that number of votes which is the product of the number of directors to be elected and the shares owned, which in the case of Mr. Marino, would be—

MR. MARINO: Mr. Pavela.

MR. FLYNN:—Mr. Pavela would be 2000 shares, and the estate of Malone would be 6,000 shares.

That being the case, Mr. Pavela, do you wish to nominate any person to be a director or directors of this corporation?

MR. PAVELA: I nominate myself as director of the corporation.

MR. FLYNN: And Mrs. Malone, do you wish to nominate any persons to the Board of Directors of Creative Office Interiors, Inc.?

MRS. MALONE: Yes, I would like to nominate three directors, Flo Malone, Frank Neylon and Mike Riley.

MR. FLYNN: Let the record show that Messrs. Michael Riley, James Pavela and Francis Neylon and Florence Malone have been nominated to the office of directors of Creative Office Interiors, Inc.

Mr. Pavela, how do you cast your 2,000 votes in the election for directors?

MR. PAVELA: I cast all my votes for myself.

MR. FLYNN: And Mrs. Malone, how do you cast your 6,000 votes in the election for directors?

MRS. MALONE: I cast 2,000 for Flo Malone, 2,000 for Frank Neylon and 2,000 for Mike Riley.

MR. FLYNN: Very well. It appears that Messrs. Riley, Neylon, Pavela and Mrs. Malone have been duly elected directors of Creative Office Interiors, Inc. for the coming year.

And the next order of things we usually do and should do is a discussion of the financial statements for the year ended December 31, 1986.

I understand that a copy of those statements which have been prepared by Peter Shannon & Co. have been sent to each of the directors, which would include Mr. Pavela, and Mr. Jim Malone is here and is

* * * * *

APPENDIX H

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, PROBATE DIVISION

Estate of	)	No. 87 P 253
)	
MARTIN J. MALONE	)	Docket 934
)	
	)	Page 206

PETITIONER'S AFFIDAVIT

James A. Pavela, being first duly sworn on oath, deposes and says:

1. In 1985, Affiant filed a stockholders derivative suit on behalf of Creative Office Interiors, Inc. (the Corporation), in which he is a minority shareholder. That suit is presently pending in the Circuit Court of Cook County, Illinois, County Department, Chancery Division, as Case No. 85 CH 2388. The Plaintiff there alleged that Martin J. Malone, James J. Flynn, and Francis M. Neylon breached their fiduciary duty to the Corporation.

2. Martin J. Malone was the majority controlling shareholder with 1,500 shares of stock until his death on December 21, 1986.

3. A meeting of the shareholders of the Corporation was held on March 12, 1987. Affiant attended with his attorney, Charles F. Marino. Also present at that meeting were Florence M. Malone, executrix of the estate of Mar-

tin J. Malone, Richard McGrath, attorney¹ for the estate, and James J. Flynn, secretary of the Corporation.

4. At said shareholders meeting, James J. Flynn announced that he understood that, under the provisions of the last will and testament of Martin J. Malone, his 1,500 shares of stock in the Corporation were included in his probate estate, and that Florence M. Malone was the executrix of Martin J. Malone's estate.

5. Voting the 1,500 shares she held as executrix of the estate of Martin J. Malone, Florence M. Malone elected herself, Francis M. Neylon and Mike Riley as directors. At a board of directors meeting immediately following the shareholders meeting, Florence M. Malone was elected President and Treasurer of the corporation with the votes of herself, Francis M. Neylon and Mike Riley.

6. Florence M. Malone was aware of the pending stockholders derivative suit which Affiant had filed on behalf of the Corporation against Martin J. Malone, James J. Flynn and Francis M. Neylon for breach of fiduciary duty.

7. Neither Florence M. Malone, Richard McGrath, nor anyone else at the March 12, 1987 shareholders and board of directors meeting of the Corporation, disclosed to Affiant or his attorney that letters were issued to Florence M. Malone on January 12, 1987 or that the claim date was six months later on July 12, 1987.

8. On August 20, 1987, the Affiant's attorney served Richard McGrath, attorney for the estate of Martin J. Malone, with a motion in said stockholders derivative suit to suggest the death of Martin J. Malone and substitute Florence M. Malone, as independent executor of his estate, pursuant to Section 2-1008 of the Illinois Code of Civil Procedure.

9. Richard McGrath first notified Affiant of the claim date in Martin J. Malone's estate on August 24, 1987, when he served Affiant's attorney with an objection to Affiant's motion to substitute Florence M. Malone, as independent executor of Martin J. Malone's estate.

10. Neither Florence M. Malone nor Richard McGrath informed Affiant or his attorney of the claim date in Martin J. Malone's estate at any time prior to August 24, 1987.

/s/ James A. Pavela
James A. Pavela

Subscribed and Sworn to before me
this 28th day of October, 1988.

/s/ Margaret B. Theise
Notary Public